

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

SUNNY M. SANDRY,)	
Appellant,)	
)	
and)	CASE NO. 102269
)	
STATE OF IOWA)	
(Department of Transportation),)	
Appellee.)	
)	

DECISION AND ORDER

This case is before the Public Employment Relations Board (PERB or Board) on Sunny M. Sandry’s petition for review of a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on Sandry’s Iowa Code section 8A.415(2) State employee disciplinary action appeal. Sandry filed her appeal alleging just cause did not support the State’s termination of her employment as a Driver’s License Clerk Senior for the Iowa Department of Transportation. The State alleged Sandry violated work rules and policy when she removed money from the state-issued cash drawer. In his proposed decision, the ALJ concluded the State established just cause supported its termination of Sandry’s employment.

Both parties filed briefs prior to oral arguments. For Sandry, attorney Charles Gribble presented oral argument to the Board and attorney Nathan Reckman presented argument on the State’s behalf.

Pursuant to Iowa Code section 17A.15(3), on appeal from an ALJ's proposed decision, we possess all powers that we would have possessed had we elected, pursuant to PERB rule 621–2.1(20), to preside at the evidentiary hearing in the place of the ALJ. Pursuant to PERB rules 621–11.8(8A,20) and 621–9.5(17A,20), on this petition for review we have utilized the record as submitted to the ALJ.

Based upon our review of this record and the parties' briefs, as well as the parties' oral arguments, we adopt the ALJ's findings of fact and we adopt the ALJ's conclusions. We concur with the ALJ's determinations and conclusion that the State established just cause supported its termination of Sandry's employment.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the proposed decision and order attached as "Appendix A," are fully supported by the record. We adopt the ALJ's factual findings as our own.

CONCLUSIONS OF LAW

We agree with the ALJ's determinations as set out in Appendix A and adopt them as our own.

Accordingly, we enter the following:

ORDER

Sunny M. Sandry's Iowa Code section 8A.415(2) State employee disciplinary action appeal is DISMISSED.

The cost of reporting and of the agency-requested transcripts in the amount of \$1,090.80 are assessed against the appellant, Sunny M. Sandry, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9(20). A bill of costs will be issued to Sandry in accordance with PERB subrule 11.9(3).

This decision constitutes final agency action.

DATED at Des Moines, Iowa, this 11th day of March, 2022.

PUBLIC EMPLOYMENT RELATIONS BOARD



Erik M. Helland, Chair



Jane M. Dufoe, Board Member

Original filed EDMS.

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

SUNNY M. SANDRY,
Appellant,

and

STATE OF IOWA (DEPARTMENT
OF TRANSPORTATION),
Appellee.

CASE NO. 102269

PROPOSED DECISION AND ORDER

The Appellant, Sunny Sandry, filed a State employee disciplinary action appeal with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code section 8A.415(2)(b) and PERB rule 621—11.2. Sandry asserts that there was not just cause to support the Iowa Department of Transportation’s termination of her employment on October 18, 2018, for her alleged violation of work rules and policy.

Pursuant to notice, an evidentiary hearing on the merits of the appeal was held before the undersigned administrative law judge on August 26, 2020. The hearing was closed to the public in accordance with section 8A.415(2)(b). Attorney Anthea Hoth represented the State and Attorneys Christopher Stewart and Charles Gribble represented Sandry. Both parties filed post-hearing briefs on October 7, 2020.

Based upon the entirety of the record, and having reviewed and considered the parties’ briefs, I conclude the State has established just cause existed to support its termination of Sandry’s employment.

FINDINGS OF FACT

Background

Sunny Sandry began employment with Iowa Department of Transportation (DOT) on August 27, 2010, at the Davenport Driver's License Station in Davenport, Iowa. Sandry subsequently transferred to the Clinton Driver and Identification Service Center (Clinton station) in Clinton, Iowa, where she worked as a Driver's License Clerk-Senior.

The duties of a Driver's License Clerk-Senior include issuing Iowa IDs and driver's licenses, taking in civil penalty fees, and conducting motorcycle driving tests and Commercial Driver's License examinations. In performing these duties, Clerks receive cash, check, and credit card payments from the public. Thus, Clerks are responsible for accurately handling and storing public money.

To ensure accuracy, each Clerk's workstation has an easily accessible file drawer designated for the placement of a wooden till used to hold public money. The wooden till consists of multiple slots used to separate the different denominations of bills and coins. The till occupies nearly all of the space inside the file drawer, leaving only an approximately two-inch wide strip of space along left side of the drawer unoccupied.

Each Clerk begins their shift with \$50 in the wooden till consisting of one \$10, five \$5, fourteen \$1, and four quarters. At the end of each shift, each Clerk's till is reviewed independently to ensure accuracy. Per DOT policy, at the end of each day, one Clerk selected on rotation performs a reconciliation, whereby the Clerk balances out the other Clerks' tills to determine whether the transactions

match the amount of cash in the till and to document any overages or shortages. When the reconciliation is complete, the Clerk in charge takes the money to U.S. Bank.

At the time of Sandry's termination, which precipitated the instant appeal, Sandry's supervisor was Sherri Ketelsen. Prior to her termination, Sandry's tenure with the DOT was predominantly satisfactory, as evidenced by her annual performance reviews rating Sandry's job performance as meeting expectations. The record shows Sandry received copies of DOT's work rules, policies and procedures and was trained on the duties and expectations of her position.

Prior to her termination, Sandry was the recipient of other workplace discipline. In July 2017, Sandry received a five-day suspension for abuse or misuse of government property and for unbecoming conduct in the workplace. However, on September 21, 2017, the DOT reduced Sandry's five-day suspension to a one-day suspension. The revised suspension notice stated, in relevant part:

This letter will serve as notice of a one (1) day suspension without pay effective July 15, 2017. This action is being taken as a result of your violation of the following Iowa Department of Transportation Work Rules.

III. Use of Property, 1. Abuse or misuse of government or private property, materials, equipment, or resources; or use of government property, materials, equipment, or resources for personal benefit.

This rule was violated on May 20, 2017, when you took twenty dollars from the DOT money bag for your personal use.

IV. Personal Actions and Appearances, 10. Unethical behavior or conduct unbecoming of a State of Iowa employee.

This rule was violated by your unbecoming behavior in the workplace on May 20, 2017. On that date co-workers observed you

moving constantly in an agitated manner in your chair and around the office, talking so fast and in incomplete sentences such that it was difficult for your co-workers to understand what you were saying and talking to yourself. You were also observed calling a customer up to the counter and then asking him to sit back down. You were observed walking away from customers sitting at your counter. A customer also reported the following about your behavior: “She seems to be in another world.”

The record also shows that at some point prior to her termination, Sandry’s supervisor, Sherri Ketelsen, coached and counseled Sandry, instructing her to keep her purse in a file drawer because a coworker observed driver’s licenses, which had been surrendered by customers, in Sandry’s purse.

The termination at issue in this appeal arose from Sandry’s conduct on August 9, 2018, which the DOT recorded in two separate surveillance videos. The incident spawned an investigation that involved the analysis of the two videos and two investigatory interviews of Sandry. In addition, four individuals testified at hearing.

Although the conduct at issue was recorded, the parties offer different explanations for Sandry’s actions and different theories about what occurred. Thus, the central issue in this case is one of fact: whether the evidence shows Sandry committed the alleged misconduct. In making this determination, this decision first reviews the undisputed evidence concerning the incident—primarily the surveillance video footage—then discusses the State’s investigation and Sandry’s testimony at hearing.

In making the following findings, I have attempted to reconcile perceived conflicts in the evidence. Where the evidence is not reasonably reconcilable, I

have noted the discrepancies and credited that which is most reasonable and consistent with other credible evidence. In making these findings, I have considered the established criteria for the making of credibility determinations, such as the witnesses' actual knowledge of the facts, memory, interest in the outcome of the case and candor. *See Barnard & State of Iowa (Dep't of Human Servs.)*, 2017 ALJ 100758 at 3.

Undisputed evidence concerning the incident

At approximately 11:25 a.m. on August 9, 2018, DOT Employee Relations Officer Emily Newton received a call from an employee at the Clinton Driver and Identification Service Center informing Newton the station was short-staffed. Due to the nature of the call, Newton pulled up the Clinton station's video footage. The Clinton station has three Driver's License Clerk workstations in the front of a large public waiting room. The camera through which Newton watched was located above and behind Sandry's workstation.

At 11:34 a.m., Newton was still on the phone with the employee when, on the surveillance footage, Newton observed Sandry finish a transaction with a customer and lock her computer. Sandry then rolled her office chair approximately one foot to the right, opened the state-issued cash drawer, and removed what appeared to be a bill from the drawer. Newton then observed Sandry, "Hold her right hand low so as not to be seen by anyone, roll the bill, [and] then tuck it under her cellphone as she left the station, presumably for her lunch break."

Concerned about what she saw, Newton extracted and saved the surveillance footage then contacted Dana McKenna, a Lead Employee Relations Officer, to discuss Sandry's actions. McKenna reviewed the video and immediately sent it to her supervisor, Linda Anderson, Director of DOT's Office of Employee Services. Anderson reviewed the footage and determined Sandry should be placed on administrative leave while DOT conducted an investigation.

Anderson followed the DOT's process for placing an employee on administrative leave by contacting and consulting with the Assistant Division Director, Division Director, and Bureau Director. All agreed with Anderson's decision. Sandry's supervisor, Sherri Ketelsen, was on vacation, so McKenna called Ketelsen and explained to her the situation. Ketelsen agreed to go into the station to place Sandry on administrative leave.

At approximately 2:20 p.m., Ketelsen arrived at the Clinton station and entered through a backdoor behind the Clerks' workstations. Sandry saw Ketelsen and, knowing Ketelsen was on vacation, got up and asked, "What the heck are you doing here?" Ketelsen told Sandry she had come in to get something off her computer. Ketelsen then went into her office and Sandry returned to her workstation.

Sandry sat down in front of her computer for approximately ten-seconds, then opened a file drawer to her left, removed her purse, and left her workstation. Sandry was away from her workstation—and thus, off camera—for approximately two-minutes. When Sandry returned to her workstation, she was no longer carrying her purse.

Upon return, Sandry sat down in front of her computer and immediately began searching through her back-right pocket. After searching through her pocket for several seconds, Sandry rolled her chair back and bent over twice, appearing to pick two small objects up off the floor. Sandry then sat up, opened the cash drawer, and continued searching through her back-right pocket, and then the floor, and then her back-left pocket for approximately fifteen seconds.

After searching through her pockets, Sandry stood up, noticed a bill on her chair, picked it up, and sat down in front of the cash drawer. Although Sandry's back was to the camera, her body language indicates that she held and adjusted the bill with both hands over the cash drawer for approximately eight-seconds.

While the camera's view of the cash drawer was largely obstructed, the two-inch strip of space unoccupied by the till on the left side of the drawer remained mostly visible. After seemingly adjusting the bill, Sandry reached forward with both arms and appeared to place the bill near the center of the cash drawer; Sandry did not appear to place the bill, nor any other object, in the two-inch strip of space on the left side of the drawer. Sandry then closed the cash drawer and moved back to her computer. The video ends shortly thereafter at 2:24 p.m.

At approximately 2:30 p.m., Ketelsen called Sandry to her office and placed Sandry on administrative leave. After receiving the leave notice, Sandry asked Ketelsen why she was being placed on leave. Ketelsen told her she was not at liberty to say at that time. Sandry then asked Ketelsen if she could borrow \$5 so

she could purchase cigarettes. Ketelsen lent Sandry \$5, and then Sandry gathered her belongings and left the station. After Sandry left, Ketelsen swept Sandry's cash drawer and counted the money in her till. Ketelsen did not find any personal items in the cash drawer and she determined the till was correctly balanced.

The State's investigation

The DOT assigned Employee Relations Officers Dana McKenna and Emily Newton to assist Ketelsen in an investigation into whether Sandry improperly took State money from her state-issued cash drawer. McKenna, Newton, and Ketelsen conducted an investigation from August 9 through mid-September 2018.

For their investigation, Newton and Ketelsen first extracted, saved and analyzed the surveillance footage discussed above. They then sent screenshots from both videos to DOT Facial Recognition Analyst Tina Lewis. Lewis determined with 100% certainty that the object Sandry removed from the cash drawer in the first video, and the object Sandry placed in the cash drawer in the second video, was currency. However, Lewis could not determine the denomination of the bills in either video.

On August 21, 2018, Newton and Ketelsen conducted their first of two investigatory interviews with Sandry. Shortly after the first interview began, right as Newton started playing the first video, Sandry stated, "I know what I did. I made change. I know exactly what I did. I don't know what we're looking at there."

However, after watching the first video—showing Sandry remove a bill from the cash drawer—Sandry stated, “We have no—nothing in there. I had my—my stuff in there too. I had change in there on the side of there because I have nothing to put in a locker now.” Sandry clarified explaining she had kept her personal money in the space on the side of the cash drawer, which was separate from the State’s money. Sandry was unable to recall the denomination of the bill or the amount of personal money she had allegedly stored in the state-issued cash drawer.

Newton then played the second video, beginning when Ketelsen unexpectedly arrived at the station at 2:20 p.m. After playing the video once through, Newton paused the video at various points and asked Sandry to explain her actions. Sandry recalled getting up and asking Ketelsen, “What the heck are you doing here?” However, Sandry purportedly could recall little else from the afternoon, as demonstrated by the following exchange:

Newton: So where did you put your purse there?

Sandry: Shit, I don’t know.

Newton: Okay.

Sandry: See, I thought I had made change, but maybe I hadn’t. Maybe I did later that day. I have no idea. And if I was leaving, I didn’t want it to not be accurate; right?

Newton: Okay. So what did you take out of your pocket?

Sandry: I have no clue, but if I was—I don’t know if I was making change or not. I have no clue.

Newton: What did you put back into the drawer?

Sandry: I—if I was making change, I have no idea, but was it off? Did I steal money? Was the drawer off?

Newton: What are you looking for on the floor here?

Sandry: I have no idea what I was looking for on the floor. You asked me like I remember yesterday. My flip-flops sometimes goes in the back corner, and I go down and get my flip-flop if it's on the camera. Is my flip-flops on? Okay. I don't know.

Newton: So what do you pick up from the chair right here and put in the drawer?

Sandry: I haven't a clue. Is it a quarter that I traded in quarters for a dollar? I haven't a clue. I steal candy from this drawer to this drawer before. I mean what –

Newton: What do you do in your cash drawer at the very end of this video?

Sandry: I don't remember what I did yesterday. I haven't a clue. You tell me.

Over the course of the interview, Sandry speculated that she may have been making change with bills or quarters, had perhaps picked quarters up off the floor, or maybe had put candy in the cash drawer. However, Sandry could not definitively explain her actions nor identify what she had placed in the cash drawer, repeatedly telling Newton “I don't remember” and “have not a clue.”

After the interview, McKenna, Newton, and Ketelsen reviewed the recording of the interview and determined a second interview with Sandry was necessary to clarify some of Sandry's responses. On September 12, 2018, Ketelsen and Newton conducted a second investigatory interview with Sandry.

In her second interview, many of Sandry's responses were similar to those in her first, namely, she could not recall where she had put her purse, what had

fallen on the floor, nor what she had picked up off her chair and placed in the cash drawer. However, three of Sandry's responses stood out.

First, when Newton asked Sandry why, right at the start of the first interview, she had said, "I know what I did. I made change. I know exactly what I did," Sandry responded:

Because I know that this—it's snakier than snake, snake, snake, and I've just—the stuff I've dealt with, why do you think I knew that was my own money and I did it conspicuous—or concealingly? Because there's cameras everywhere, for one.

For two, if you're waiting on a customer and you take money and that money drawer is right there, I don't want to look like I'm taking money from there with customers that can be around, and No. 2, there's cameras everywhere.

When Newton asked Sandry again why she had assumed the video related to money, Sandry simply responded, "Don't know."

These responses stand out for two reasons. First, it is clear Sandry knew that if she were seen removing money from the state-issued cash drawer, it would look to others like she was stealing. Yet, she allegedly chose to store her money in the cash drawer anyway. Second, Sandry's inability to explain why she said she was making change at the start of the first interview suggests Sandry knew, prior to the first interview, that the investigation involved her handling of money.

Sandry's third significant response occurred when Newton asked Sandry to explain why she had said, "and if I was leaving, I didn't want [the cash drawer] to not be accurate." Newton pointed out that Ketelsen had not yet placed Sandry on leave when Sandry put the object in the cash drawer. Sandry responded:

Well, what the hell was Sherri doing there? I assumed that—I mean she didn't even know why she was there. You really didn't.

You said you were getting on the thing, your e-mail, and I have a good gut intuition that I've been treated shadily over this whole thing. I was just not surprised that it wouldn't be something to do with me.

This response indicates that at the time Sandry placed money in the cash drawer, Sandry suspected she might soon be subject to discipline or placed on administrative leave. Further, it raises an inference that Sandry's reason for placing the money back in the cash drawer was to balance the drawer.

After the interviews, the investigators summarized their findings in a report, which included Sandry's employment history, past discipline, performance evaluations, an overview of the investigation, and their findings. The report concluded, "Sunny's action show an intent to steal State funds and therefore, we are recommending summary discharge."

Newton and McKenna presented their report to a review committee consisting of both Sandry's and the investigators' chains of command. The committee reviewed the report, the videos, the interviews, DOT's work rules, Sandry's employment history and her prior discipline. Based on its review, the committee concurred with the report's findings, determined Sandry could no longer be trusted to maintain stewardship of State money, and concluded termination was appropriate.

On October 10, 2018, Ketelsen conducted a *Loudermill* interview with Sandry. Ketelsen told Sandry that management had finished its investigation and was considering termination for violating work rules regarding the misuse

and unauthorized possession of government property and conduct unbecoming of a State of Iowa employee. Ketelsen provided Sandry an opportunity to explain why termination was not appropriate. Sandry responded, "Because the money wasn't off, and I didn't steal, period." The committee determined to proceed with termination.

On October 10, 2018, the DOT issued Sandry a termination letter. The notice stated, in relevant part:

This letter will serve as notice of termination effective October 18, 2018. This action is being taken as a result of your violation of the following Iowa Department of Transportation Work Rules.

III. Use of Property, 1. Abuse or misuse of government or private property, materials, equipment, or resources; or use of government property, materials, equipment, or resources for personal benefit.

III. Use of Property, 2. Stealing, unauthorized possession or use of government or private property, equipment, materials, or resources.

IV. Personal Actions and Appearances, 10. Unethical behavior or conduct unbecoming of a State of Iowa employee.

These rules were violated on August 9, 2018, when you took state money from the state-issued cash drawer and then only returned it after your supervisor arrived unexpectedly several hours later.

You received a one-day suspension on September 21, 2017.

On October 15, 2018, Sandry appealed her termination to DAS claiming she was "discharged without just cause." On November 14, 2018, The DAS director's designee denied Sandry's appeal. On November 27, 2018, Sandry filed the instant appeal with PERB.

Sandry's testimony

At the hearing, Sandry's counsel played the video footage discussed above and Sandry testified as to her conduct at various points in the videos. Although Sandry's testimony did not necessarily conflict with her prior statements, at the hearing, Sandry recalled the events of August 9, 2018, in considerably more detail than she had in either of her interviews and she provided explanations for all of her actions.

For instance, reviewing the first video, Sandry maintained that the currency she removed from the cash drawer was her personal money, which she had allegedly stored in the space next to the till. However, Sandry also recalled it was a \$20 bill; a fact Sandry had not been able to recall when interviewed.

Further, consistent with her interview responses, Sandry said she removed the bill in a concealing manner because "you're always on stage" and, having just taken a cash payment from a customer, she did not want the customer to see her and mistakenly believe she was taking their money from the cash drawer. However, Sandry added that over her lunch break, she went to the gas station and spent \$13 or \$14, then went to Taco Bell and bought a \$2 bean burrito and fountain pop, and then returned to work with approximately \$2 in change.

Reviewing the second video, Sandry testified that after greeting Ketelsen, she took her purse into the breakroom, took out her two afternoon pills, and placed one pill in each of her back pockets. Sandry explained that she did not bring her purse back to her workstation because it was almost time to go on her 2:30 p.m. break and she "just didn't haul it back out."

Further, Sandry recalled that when she was searching through her pockets, she was looking for her medication and one of the pills fell onto the floor. When she reached down and grabbed it, she noticed a coin on the floor, so she picked up the coin as well. After looking for her pills, Sandry said she noticed the \$2 left over from lunch had fallen out onto her chair, so she picked up the bills and put them in the space on the side of the cash drawer next to the till.

When asked why she had not provided these explanations when interviewed, Sandry said that she had been unable to recall much of her conduct because the first interview occurred twelve days after the incident, she had not reviewed the footage clip-by-clip, and the questions Newton asked were accusatory. However, after obtaining legal counsel and reviewing the footage clip-by-clip without feeling accused, Sandry said she was able to recall more details about the day and piece together her conduct in the videos. Although it is possible that Sandry recalled some additional details after she was interviewed, two facts stand out which cast doubt on Sandry's explanation and raise concerns about the credibility and accuracy of her testimony.

First, under the circumstances, Sandry's near complete lack of recollection during her interviews is suspect. Although the first interview occurred twelve days after the incident, Sandry had the assistance of video footage to help her recall what she was doing only minutes before her supervisor placed her on leave.

Even twelve-days later, it is unusual Sandry had no recollection of her conduct immediately before being placed on leave. More unusual still is the fact that after reviewing surveillance footage of her actions, Sandry could not explain

any of her conduct, and, in particular, could not recall what she placed in the state-issued cash drawer immediately before being placed on leave. Under these circumstances, Sandry's near complete inability to recall her conduct twelve-days after the incident raises concerns about the accuracy of her testimony, which purportedly was based on recollections that occurred many months later.

Casting further doubt on the accuracy of Sandry's testimony is the fact that one significant aspect her testimony is not consistent with the video evidence. Specifically, Sandry testified that after she noticed the \$2 on her chair, she picked up the bills and put them in the space on the left side of the cash drawer next to the till. However, as discussed above, in this portion of the video, the space on the left side of the drawer remains mostly visible and Sandry never appears to place anything in that space. Rather, Sandry appears to adjust the bills for approximately eight seconds before reaching forward and placing the bills near the middle of the drawer.

Although there is some uncertainty as to Sandry's specific actions, her conduct in the video is not consistent with her testimony that she simply placed the money in the left side of the cash drawer. Were that the case, the video would show Sandry reach over to the left side of the drawer at some point, the act likely would have taken fewer than eight seconds, and Sandry would not have reached over the middle of the drawer before shutting it. This inconsistency, together with Sandry's inability to explain her actions when interviewed, cast doubt on the accuracy and reliability of Sandry's testimony. For these reasons, the undersigned has given Sandry's testimony limited weight.

CONCLUSIONS OF LAW

Sandry filed this appeal pursuant to Iowa Code section 8A.415(2), which provides:

2. Discipline Resolution

a. A merit system employee...who is discharged, suspended, demoted, or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

b. If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board...If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

DAS rules provide specific disciplinary measures and procedures for disciplining employees:

11—60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge....Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

Just cause must exist to support the disciplinary action taken. The State bears the burden of establishing that just cause supports the discipline imposed. *Harrison & State of Iowa (Dep't of Human Servs.)*, 05-MA-04 at 9.

In the absence of a definition of just cause, PERB has long considered the totality of circumstances and rejected a mechanical, inflexible application of fixed elements in its determination of whether just cause exists. *Wiarda & State of Iowa (Dep't of Human Servs.)*, 01-MA-03 at 13-14. In analyzing the totality of circumstances, examples of factors that may be relevant to a just cause determination include, but are not limited to:

Whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether there is sufficient proof of the employee's guilt of the offense; whether progressive discipline was followed, or is not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

Gleiser & State of Iowa (Dep't of Transp.), 09-MA-01 at 16-17.

PERB also considers the treatment afforded other, similarly situated employees relevant to a just cause determination. See *Woods & State of Iowa (Dep't of Inspects. and Appeals)*, 03-MA-01 at 2. All employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for a difference in the penalty imposed. *Id.*

Iowa Code section 8A.413(19)(b) and DAS subrule 60.2(1)(b) require the State to provide the employee being disciplined with a written statement of the reasons for the discipline. PERB has long held the presence or absence of just cause must be determined upon the stated reasons in the disciplinary letter alone. *See Eaves & State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14; *see also Hunsaker & State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 46, n. 27.

The stated reason for Sandry's discharge contained in the termination notice is that on August 9, 2018, "[Sandry] took state money from the state-issued cash drawer and then only returned it after [her] supervisor arrived unexpectedly several hours later." The State contends Sandry's conduct violated three DOT work rules—quoted in full above—prohibiting the misuse, theft, unauthorized possession or use of government property for personal benefit as well as unethical behavior or conduct unbecoming of a State of Iowa employee. For the reasons discussed below, I conclude the State has established just cause existed to support its termination of Sandry's employment.

Notice of work rules and communication of discipline

The parties do not dispute Sandry had knowledge of DOT's work rules and expectations. The record shows management provided Sandry copies of its work rules and trained Sandry on the expectations associated with her position. Moreover, in September 2017, Sandry received a one-day paper suspension for misuse of government property in violation of DOT work rules III(1) and IV(10), both of which the State alleges Sandry violated in this case.

Further, management apprised Sandry of the reasons for its termination of her employment through her *Loudermill* interview and termination letter. The termination letter provided the rules violated, the date of the incident, and the conduct that led to the discipline. Therefore, Sandry had knowledge of DOT's work rules and management adequately communicated its reasons for discipline.

Sufficient investigation

Management conducted a sufficient and fair investigation of Sandry's conduct on August 9, 2018. McKenna, Newton, and Ketelsen conducted the investigation. Prior to interviewing Sandry, Newton and Ketelsen reviewed surveillance footage of Sandry's conduct and sent screenshots from the videos to a DOT Facial Recognition Analyst. After confirming Sandry had been handling currency, Newton and Ketelsen interviewed Sandry on two, non-consecutive days regarding her alleged misuse of money.

In the interviews, Sandry had the opportunity to review the videos, respond to questions, and explain her alleged misconduct. As Newton was the only other witness to Sandry's conduct, it was unnecessary for management to interview additional witnesses.

Although the first interview did not occur until twelve-days after the incident, before questioning Sandry, Newton played the video footage to help refresh Sandry's memory and paused the video when asking about specific conduct. Under these circumstances, where management needed time to investigate prior to the first interview, and where Sandry had the opportunity

review the video footage to refresh her memory, I conclude the twelve-day delay was not unreasonable. Newton and Ketelsen conducted an investigation that was fair to Sandry and sufficiently garnered the facts to determine whether Sandry improperly took State money on August 9, 2018.

Sufficient proof of employee's guilt

Sandry admits she removed money from the state-issued cash drawer. However, she claims it was her personal money, which she stored in the side of the drawer. For this reason, Sandry contends the State has failed to prove she removed State money for her own personal use. Further, because no DOT work rules prohibit the storage of personal money in state-issued cash drawers, Sandry argues the State has failed to prove she violated a work rule and, therefore, has failed to establish just cause for her termination. For the reasons discussed below, I disagree.

In order to establish just cause, the State must demonstrate the employee is guilty of violating the work rules, policy, or agreement cited in the termination letter. *See Gleiser & State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17-18, 21. As discussed above, the work rules cited in the termination letter prohibit misuse, theft, and unauthorized possession of government property. Although the letter refers to several different forms of misappropriation, regardless of the form, arbitrators commonly use a four-pronged test to resolve disciplinary cases involving these types of allegations. *See Norman Brand, Discipline and Discharge in Arbitration*, BNA Books 2016, p. 7-3. To support the discipline or discharge of

an employee for misappropriation, an employer generally must establish the following elements:

- (1) The goods belonged to the employer, another employee, a customer, or a member of the public;
- (2) The employee exercised control over the goods, carried away or removed the goods from the place in which it had been deposited, or converted the goods to the employee's own use;
- (3) The goods were taken without express or implied consent; and
- (4) The goods were taken with the...intent to deprive the owner of the property permanently.

Id.

In cases involving alleged misconduct of this nature, PERB has held that the proof of misconduct should be clear and convincing. *See Eaves & State of Iowa (Dep't of Corr.)*, 03-MA-04 at 16; *see also Miers & State of Iowa (Dep't of Corr.)*, 2020 ALJ 102116 at 77. "Clear and convincing evidence is more than a preponderance of the evidence and less than evidence beyond a reasonable doubt;" it means, "There must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence." *In re M.S.*, 889 N.W.2d 675, 679 (Iowa Ct. App. 2016). In this case, the State has met its burden.

As discussed above, there is no dispute that Sandry, in a concealing manner, removed money from her state-issued cash drawer and then left her workstation for lunch. It is also undisputed that minutes after her supervisor unexpectedly arrived at the station, Sandry got up, left her workstation with her purse, and then returned and placed money in her state-issued cash drawer. Although the record is absent of direct evidence establishing the money Sandry

took belonged to the State, the circumstantial evidence leaves no serious doubt that it did.

First, Sandry's explanation that she stored her personal money in the state-issued cash drawer is unconvincing. Specifically, Sandry made clear that when she removed the money from her state-issued cash drawer she was aware that she was on camera and she knew removing money from the drawer would look like theft. Knowing this, Sandry's alleged decision to store personal money in the state-issued cash drawer makes no sense and, if true, required exceedingly poor judgment. A misjudgment such as this is unusual from an employee with eight-years of experience in the position.

Casting further doubt on Sandry's explanation is the suspicious timing of her actions. Specifically, the fact Sandry placed money back in the cash drawer mere minutes after her supervisor unexpectedly arrived suggests a guilty motive: that Sandry was replacing the money she took to avoid being caught. This inference is further supported by Sandry's interview response, "I didn't want [the drawer] to not be accurate" and by the surveillance footage appearing to show Sandry place currency in the middle of her cash drawer, not on the left side as she testified.

This evidence, along with the surveillance footage and Sandry's inability to explain her conduct when interviewed raises a strong inference that the money Sandry removed belonged to the State. Moreover, as Sandry only returned the money after her supervisor unexpectedly arrived, it is reasonable to conclude Sandry took the money with the intent to keep it. Accordingly, the State has

provided sufficient proof Sandry removed and carried away State money with the intent to keep it in violation of DOT work rules III(1), III(2), and IV(10).

Progressive discipline/punishment proportionate to offense

PERB has consistently considered whether the State has used a system of progressive discipline when determining whether the discipline imposed was proportionate to the offense.

Progressive discipline is a system where measures of increasing severity are applied to repeated offenses until the behavior is corrected or it is clear the behavior cannot be corrected. *See Nimry & State of Iowa (Dep't of Nat. Res.)*, 08-MA-09, 08-MA-18 at App. 30. The purpose is to convey the seriousness of the behavior while affording an employee the opportunity to improve and take corrective responsibility. *See Phillips & State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 16. When determining the appropriate discipline and the use or absence of progressive discipline, PERB considers the circumstances of the case. *See Hoffmann & State of Iowa (Dep't of Transp.)*, 93-MA-21 at 26.

Progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *See Phillips*, 12-MA-05 at App. 13, 16-18. When determining the appropriate type of discipline given the circumstances, PERB examines the severity and extent of the violation, the employee's position of responsibility, the employee's prior work record, and whether the violation has caused the employer to lose trust in the employee. *See Phillips & State of Iowa (Dep't of Corr.)*, 98-HO-09 at 15; *see also Estate of Salier & State of Iowa (Dep't of Corr.)*, 95-HO-05 at 17.

Generally, arbitrators do not require the use of progressive discipline when there is a clear intent to misappropriate property because “the act, conduct, or behavior involved is inimical to employer-employee trust.” See Norman Brand, *Discipline and Discharge in Arbitration*, BNA Books 2016, p. 7-4; see also *Wilkerson-Moore & State of Iowa (Dep’t of Human Servs.)*, 2017 PERB 100788 at App. 20. When there is a clear intent to deprive another of their property, many arbitrators take a strict approach that no mitigating factors can or should lessen the disciplinary penalty. See *Id.* However, others look at the employment record, length of service, harm to the employer, motivation of the employee, or the employee’s attempts to deny the conduct. See *Id.*

In this case, the State acknowledges that DOT did not follow progressive discipline. However, the State contends Sandry’s conduct was so egregious and violative of DOT’s trust that progressive discipline was inapplicable and termination was appropriate. The undersigned agrees.

As a Clerk-Senior, Sandry was responsible for handling public money, a duty that requires a high degree of trust from her employer. As discussed above, the State has established Sandry took public money and only returned it after her supervisor unexpectedly arrived. Moreover, the record shows this was not Sandry’s first offense, as she was suspended approximately one-year prior for misuse of government property and conduct unbecoming of a State employee.

By taking public money, Sandry committed a serious violation of DOT’s work rules. Her actions not only violated a core job responsibility, but also breached the bond of trust with her employer and eroded DOT’s faith in her

ability to act as an honest steward of the public's money. Under these circumstances, DOT's loss of trust in Sandry is reasonable and progressive discipline is inapplicable.

Finally, the record shows DOT properly considered Sandry's employment record prior to making its final decision to terminate her employment. Although Sandry was a mostly satisfactory employee for approximately eight years, her employment record is not enough to outweigh the gravity of her actions in this case. Accordingly, the State has established just cause existed to terminate Sandry's employment. Consequently, I propose the following:

ORDER

Sandry's State employee disciplinary action appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$906.50 are assessed against the Appellant, Sunny Sandry, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant in accordance with PERB subrule 11.9(3).

The proposed decision and order will become PERB's final agency action on the merits of Sandry's appeal pursuant to PERB rule 621—9.1 unless, within 20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own motion.

DATED at Des Moines, Iowa this 11th day of June, 2021.

A handwritten signature in black ink, reading "Patrick B. Thomas", written over a solid horizontal line.

Patrick B. Thomas
Administrative Law Judge

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